DENVER & RIO GRANDE WESTERN RAILROAD CO.

IBLA 81-483 Decided March 28, 1983

Appeal from a decision of the Colorado State Office, Bureau of Land Management, determining the fair market rental of communications site right-of-way C-028183.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Regulations: Applicability-- Rights-of-Way: Act of March 4, 1911

   Where an easement for a right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and was not conformed to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1976), in accordance with sec. 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), regulation 43 CFR 2803.1-2(d), which allows rental adjustment without a prior hearing, is not applicable.

2. Administrative Procedure: Hearings-- Appraisals--Communication Sites--Hearings-- Rights-of-Way: Act of March 4, 1911

   Under 43 CFR 2802.1-7(e) (1979), which provided that charges for use and occupancy of a communication site on public lands may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure.

3. Administrative Procedure: Hearings-- Appraisals-- Communication Sites--Hearings--Rights-of-Way: Act of March 4, 1911

   The requirement of 43 CFR 2802.1-7(e) (1979) for notice and opportunity for a hearing may be fulfilled at the state office level in accordance with the basic procedural standards set forth in Circle L., Inc., 36 IBLA 260 (1978).

4. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way-- Rights-of-Way: Federal Land Policy and Management Act of 1976

   Where the current fair rental value of a communications site right-of-way has been determined in accordance with accepted appraisal procedures but where the lessee has provided sufficient evidence on appeal to engender substantial doubt as to the data utilized and the conclusion reached in the appraisal report, the matter will be remanded for reconsideration.

APPEARANCES: H. A. Phillips, Director, Land and Contract Department, Denver & Rio Grande Western Railroad Company, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Denver & Rio Grande Western Railroad Company appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated February 20, 1981, determining the fair market rental of right-of-way C-028183 for a microwave station site and access road to be $750 per year. The decision below also held that rental in the amount of $34 for the period January 1 through December 31, 1981, was past due and must be submitted.

The right of way, a 300- by 300-foot tract in Grand County, Colorado, was granted on February 4, 1960, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976), at an annual rental of $55. The rental was increased on February 20, 1981, pursuant to a reappraisal to ascertain the fair market value of the tract. In the decision below, BLM amended the grant document dated February 4, 1960, to read that the annual rental was $750. BLM determined that all other terms, conditions, and stipulations of the grant remained in full force and effect. No hearing apparently was held before the increase was imposed.

The issue raised on appeal is whether the $750 annual rental is too high. BLM arrived at this figure by considering the rents derived from three

communication sites which it regarded as comparable to that in the instant case. Appellant takes exception to BLM's practice, arguing that BLM incorrectly excludes from its comparable analysis those rents paid by condemning authorities, such as a governmental body or railroad, for comparable communication sites. Appellant contends that power and access are overemphasized in the BLM appraisal and submits a long list of 57 communication site leases held by other lessors and 15 communication site leases held by appellant to be used as comparable leases in arriving at the new rental for the lease here in issue.

[1, 2] The right-of-way was granted under authority of the Act of March 4, 1911, as amended, supra. This Act was repealed by section 706 of the Federal Land Policy and Management Act of 1976 (FLPMA). However, section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), provides that no existing right-of-way shall be terminated but that the Secretary of the Interior, with the consent of the holder of the right-of-way, may cancel the original right-of-way and in its stead issue a new right-of-way pursuant to Title V of FLPMA.

43 CFR 2802.1-7(e) (1979), formerly 43 CFR 244.21(e), which applies to pre-FLPMA rights-of-way, set forth the procedure for revising charges for use and occupancy of a communications site. That regulation provided:

> At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year. [Emphasis added.]

43 CFR 2803.1-2(d), promulgated to implement the right-of-way provisions of FLPMA, 43 U.S.C. § 1769(a) (1976), allows rental adjustment without a prior hearing. This regulation is applicable to rights-of-way issued under the authority of FLPMA and to those preexisting rights-of-way which have been conformed to FLPMA in accordance with 43 U.S.C. § 1769(a) (1976). See Mountain States Telephone & Telegraph Co., 60 IBLA 221 (1981).

In the instant case, the right-of-way has not been conformed to FLPMA but is the original right-of-way with an amendment as to the amount of the rental. Therefore, where, as in this case, a right-of-way has been issued pursuant to the Act of March 4, 1911, and has not been conformed to FLPMA, no rental increase may be imposed until after reasonable notice and an opportunity for hearing. U.S. Steel Corp., 71 IBLA 88 (1983); Mountain States Telephone & Telegraph Co., supra.

[3] The opportunity for a hearing under 43 CFR 2802.1-7(e) (1979) may be satisfied by a hearing at the BLM state office level in accordance with the basic procedural standards set forth in Circle L., Inc., 36 IBLA 260 (1978). Mountain States Telephone & Telegraph Co., supra. In view of the foregoing, we shall remand this case to provide for reasonable notice and the opportunity for a hearing.

In a recent case involving the same appellant, Denver & Rio Grande Western Railroad Co., 58 IBLA 4 (1981), the Board resolved the issues appellant here raises on appeal, which are (a) whether the appraisal correctly excludes from its comparable analysis rents paid by condemning authorities, and (b) whether the reappraisal should include a study of a large number of communication site leases in arriving at the new rental for appellant. As to the first question, the Board held that BLM properly excluded rents paid by condemning authorities. In that case BLM had sufficient private transactions available as comparable leases in order to reach an appraisal without considering rentals paid by condemning authorities. 1/ In this case the same appears to be true; however, on remand BLM should consider whether evidence of rentals paid by condemning authorities should properly be excluded from consideration.

[4] As to including numerous other leases as comparable properties, the Board in the above-cited Denver & Rio Grande decision noted that such data seemed to be introduced into the record for the first time on appeal and that BLM appraisal personnel had not considered this information. In addition, some of the listed sites were near the lease in question. The Board held that BLM should consider the new data. Therefore, the Board in the earlier Denver & Rio Grande case remanded the case for BLM to reconsider the appraisal in the light of the numerous other leases mentioned of appeal. 2/ The Board in the remand specifically noted that a reappraisal was not required unless, on consideration, BLM was of the opinion a reappraisal was indicated. As the facts of both cases as to consideration of other leases are substantially the same, we hereby apply the holding of the earlier Denver & Rio Grande case to the instant case. We direct that BLM reconsider its reappraisal by taking into account the data as to the rent of the various communication site leases submitted by appellant. If a second reappraisal is needed after the consideration of the additional data, BLM may require a second reappraisal. 3/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed

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1/ We also have held, however, that BLM is not barred from considering such evidence where to do so would frustrate the attempt to determine fair market value. Northwest Pipeline Corp., 65 IBLA 245, 252 (1982) (petition for reconsideration pending).

2/ We note that many of the comparable leases listed by appellant include lessees who probably possess the power of condemnation, i.e., the Federal Aviation Administration, the Colorado Division of Communication and various pipeline companies. See Denver & Rio Grande Western Railroad Co., supra at 7. BLM should review appellant's list to determine whether there are sufficient private transactions available so that the leases to condemning authorities may be safely ignored.

3/ The file contains a memorandum to BLM from the Chief State Appraiser stating that the appraisal report of annual fair market value of $750 is dated Oct. 24, 1978, effective through Oct. 24, 1983, and that the case file should be returned for reappraisal about Apr. 1, 1983.

from is set aside and the case is remanded to the Colorado State Office, BLM, for further action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge